Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	WT Docket No. 08-165

REPLY COMMENTS OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE CITY AND COUNTY OF SAN FRANCISCO IN RESPONSE TO THE PETITION FOR DECLARATORY RULING OF CTIA – THE WIRELESS ASSOCIATION

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INTRODUCTION AND SUMMARY

The League of California Cities,[1] the California State Association of Counties,[2] and the City and County of San Francisco ("collectively California Cities") submit these reply comments in response to the Petition for Declaratory Ruling ("Petition") of CTIA – The Wireless Association ("CTIA"). Although many members of the wireless industry unsurprisingly submitted comments supporting CTIA's petition, none of those comments rescue CTIA's proposals from its fatal legal and policy defects.

None of the wireless industry commenters come to grips with Congress' manifest intent not to impose fixed time limits on local decisions regarding wireless siting applicants. In 47

[1] The League of California Cities is an association of all 480 California cities united in promoting the general welfare of cities and their citizens.

[2] The California State Association of Counties is a non-profit corporation made up of the 58 California counties.

U.S.C. Section 332(c)(7)(B)(ii), Congress instead prescribes that the reasonableness of a decision-making timeline is to be judged on a case-by-case basis by reference to the "nature and scope" of the particular request.[3] Furthermore, the wireless industry commenters carefully avoid any mention of the Conference Report passage in which Congress unequivocally rejects any interpretation or rule – such as CTIA's proposal – that would "give preferential treatment" to the wireless industry.[4]

The wireless industry further undermines its credibility by ignoring the many variables that affect the timeline for wireless siting decisions and that counsel in favor of the case-by-case approach that Congress mandated. These variables include: the location, size, and appearance of the proposed facility, the extent of community concerns, the possibility of appeals, the potential need for environmental review, and the applicable public meeting, notice and agenda requirements. Like CTIA's petition, the wireless industry comments refuse even to acknowledge that applicants can be a significant cause of delay by failing to submit complete applications or by neglecting to address community and local planners' concerns in their proposals. CTIA's proposal would unfairly charge these delays of the carriers' own making to local governments – effectively depriving the public of decisions based on complete and fully developed proposals. Moreover, CTIA's inflexible timelines would sharply diminish the incentive the wireless carriers now have to propose reasonable projects that anticipate and address legitimate local concerns.

Again, similar to CTIA, most of the wireless industry commenters refrain from naming specific jurisdictions that are alleged to have unreasonably delayed the processing of wireless siting applications. As a result, local governments are unable to answer these claims, and the Commission should give them no credence. Only two comments name particular California

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[3] § 332(c)(7)(B)(ii).

[4] H.R. Conf. Rep. No. 104-458 (1996), pp. 207-208 ("Conference Report").

jurisdictions in which undue delays are alleged. These allegations that are either baseless or exaggerated and accordingly fail to furnish a record that supports CTIA's petition.

Contrary to the assertions of the California Wireless Association, the California Permit Streamlining Act ("PSA") imposes meaningful limits on the decision-making timelines for land use permits in California. Unlike the CTIA proposal, the PSA recognizes that applicants can delay a decision by failing to submit complete applications. In addition, the PSA contains necessary safeguards – absent from CTIA's proposal -- to protect the public's right to notice of land use applications and an opportunity to be heard. The PSA shows that state and local governments such as California are capable of addressing in a reasonable way industry concerns that permit processing takes too long. There is no need for the Commission to preempt such state and local requirements.

In sum, CTIA's proposal is legally improper and unjustified as a matter of policy. The Commission should deny the CTIA petition without delay and allow local governments to focus their time and resources on reviewing siting requests rather than responding to such ill-considered petitions.

DISCUSSION

I. THE WIRELESS CARRIERS IGNORE THE NUMEROUS VARIABLES – MANY OF WHICH ARE IN THEIR CONTROL – THAT AFFECT THE TIME REQUIRED TO DECIDE WIRELESS SITING APPLICATIONS

The opening comments of the wireless carriers simply ignore the many variables – detailed in California Cities' opening comments[5] and summarized below – that affect the timeline for wireless siting applications. Only by striking this head-in-the-sand pose can the wireless carriers purport to justify binary time limits when Congress wisely mandated a case-by-case approach. Some of the carriers make the same specious argument that CTIA advanced –

[5] California Cities' Opening Comments, pp. 10-16.

that, because many requests are decided in less than 45 or 75 days, those time limits are reasonable.[6] The reality is that, while many requests are relatively simple and non-controversial and can be addressed quickly, some requests take significantly longer to decide, often because of choices or omissions by the applicants.

Congress recognized that the amount of time that is reasonable to decide a wireless siting application depends on the "nature and scope" of the request.[7] In our opening comments,[8] California Cities showed that a variety of factors affect the time that is required to decide applications to construct wireless facilities, including the following:

- Completeness of the application: Failure to provide required information can significantly delay an application.
- Location of the proposed facilities: Generally, requests to site facilities in industrial and commercial areas present fewer issues and procedural requirements than facilities that would be located in or near residential, historic, or scenic areas.
- Size and appearance of the proposed facilities: As the series of pictures in the opening comments of SCAN NATOA show, wireless facilities vary significantly in appearance, particularly when one considers the broad array of camouflaging techniques that are available.[9] Applications to site facilities in aesthetically sensitive areas that do not reflect a concerted effort to minimize the visual impact

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[6] *See, e.g.*, Comments of Verizon Wireless ("Verizon"), pp. 8-9; Comments of Sprint Nextel Corp. ("Sprint"), p. 6; Comments of MetroPCS Communications, Inc. ("MetroPCS"), pp. 7-8. AT&T acknowledges that it has found the "vast majority" of localities to be reasonable. (AT&T Comments, p. 2). The argument that CTIA's time limits are reasonable because most jurisdictions comply with them undercuts the need for CTIA's proposal at all.

[7] § 332(c)(7)(B)(ii).

[8] California Cities' Opening Comments, pp. 10-16.

[9] Comments of SCAN NATOA, Inc., pp. 15-23.

are more likely to encounter objections from the community and local planning authorities.

- Community concerns regarding the proposal: Local officials obviously cannot ignore legitimate community concerns and will need to work with applicants to attempt to address those concerns. Applicants can speed their applications by working through community concerns before they submit their applications.
- Appeals: Local laws typically allow appeals of initial land use decisions, which usually require one or more additional hearings and the further development of a written record.
- Need for environmental review: In California, the California Environmental Quality Act ("CEQA")[10] may require additional analysis by local planning staff and additional public comment opportunities.
- Public meeting, notice, and agenda requirements: In California, decisions on applications by a multi-member body must be made at public meetings that satisfy advance notice and agenda requirements. A quorum of decision-makers may only discuss the application at public meetings, not in private. In some jurisdictions and at certain times of the year, such public meetings may only be held monthly or bi-monthly.

It was undoubtedly because of such significant variations in the nature and scope of wireless siting requests that Congress did not impose rigid deadlines of the type that CTIA demands.

Moreover, CTIA's proposed inflexible time limits are based on the false assumption that local governments bear sole responsibility for the time it takes to decide applications. As shown above, applicants influence the decision-making timeline in at least the following ways: (1) the

[10] California Public Resources Code §§ 21000 *et seq.*

extent to which the application is complete; (2) the proposed location that applicants choose; (3) the size and appearance of the facilities that applicants propose; and (4) the extent to which applicants address legitimate community concerns before submitting applications. CTIA's inflexible timelines would sharply diminish the incentive the wireless carriers now have to propose reasonable projects that anticipate and address legitimate local concerns.

II. THE WIRELESS CARRIERS FAIL TO SHOW THAT LOCAL GOVERNMENTS IN CALIFORNIA TAKE AN UNREASONABLE AMOUNT OF TIME TO DECIDE WIRELESS SITING APPLICATIONS

CTIA's petition rests on vague, general and unsupported allegations of delays by local governments. Even when referencing specific examples that CTIA considers particularly egregious, the petition carefully avoids naming any particular local government. As a result, local governments have been deprived of an opportunity to specifically answer CTIA's allegations.

The opening comments afforded CTIA's members another opportunity to provide specific facts and data to which local governments could respond. For the most part, the wireless industry commenters again fail to provide specific data relating to named localities that is amenable to analysis and response. For example, Verizon presents timeline statistics for vague and highly aggregated geographic areas such as "Northern California", "Southern California" and the "San Diego area."[11] California has 480 cities and 58 counties; in San Diego County alone, there are 19 separate local jurisdictions. In the absence of specifically named governments, California Cities do not know which jurisdiction to contact to test the veracity of Verizon's assertions. Sprint makes similarly vague allegations that cannot be tested, regarding "a few California communities" and an unnamed California county.[12] The Commission should

[11] Verizon Opening Comments, pp. 6-7.

[12] Sprint Opening Comments, p. 5.

not give any credence to such unverifiable assertions, particularly when, as shown below, the industry claims that can be tested are exaggerated, misleading, or inaccurate.

Of all the many comments submitted by wireless industry associations or members, only two -- the California Wireless Association ("CALWA") and T-Mobile USA, Inc. ("T-Mobile") -- name specific California jurisdictions in which undue delays are alleged. CALWA offers only isolated examples of what it considers to be egregious delays. Such isolated examples can hardly furnish or even support a factual record of unreasonable delays by local governments. In any event, even those hand-picked examples fail to recount important facts that help to explain the timelines:

> City of San Diego: CALWA's summary[13] ignores several pertinent details that show that the applicant, not the city, was responsible for the delay. The tower company applied for a permit at a site where a tower existed but a prior permit had expired. The permit was not automatically renewable, so a new permit application was required. The tower in question did not comply with the City's regulations. Therefore, within thirty days of the application, the City denied the permit application. Concurrent with rejection of the application, the City provided the tower company with a list of proposed changes to allow the tower to satisfy permitting requirements. The tower company chose not to resubmit its application. Instead, it sought to change the City's permitting requirements–initially through the political process and then by filing a lawsuit. In order to include the permit denial in its lawsuit, the tower company finally agreed to appear at a planning commission hearing. The hearing was held at the first available date and the commission denied the permit. It was the applicant's delay in requesting a hearing which led to the administrative process being completed in 2008 instead of 2006.[14]
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> City of Berkeley: CALWA[15] fails to mention that Verizon's proposed facilities were located in a predominantly residential neighborhood and raised significant community concerns. Neighbors appealed the city's original determination to approve the facilities, and the City Council responded to the appeal by requiring the development of an additional factual record to address the issues raised by the neighbors. In addition,

[13] CALWA Opening Comments, p. 2.

[14] Source: City of San Diego.

[15] CALWA Opening Comments, p. 2.

> Verizon delayed the application for at least four months by failing to pay required fees to cover the costs of an independent consultant.[16]

T-Mobile presents a hearsay-based declaration with allegations regarding various local jurisdictions. These allegations are either exaggerated or baseless, as demonstrated below[17]:

> City of Gardena: T-Mobile alleges, "In the City of Gardena, California, it took two years to get a denial on a setback variance which had no effect on the neighboring sites nor health and safety of the neighborhood. Through litigation, T-Mobile was able to build its site."[18] T-Mobile mischaracterizes both the litigation and the reason for the delay. In fact, the court case did not deal with a setback variance, or health and safety of the neighborhood. Rather, the case centered on an inferior design for a monopalm cell tower. Filed in August of 2006, the case was dismissed in February 2007 when T-Mobile agreed to construct an aesthetically improved monopalm cell tower, and the City agreed to permit T-Mobile to increase the height of the proposed project to accommodate T-Mobile's signal transmission needs. Far from T-Mobile being able to build the site through litigation, this case was appropriately settled and dismissed as a direct result of the City of Gardena and T-Mobile reaching an accord that addressed the needs of all of the parties.[19]
>
> City and County of San Francisco: T-Mobile claims that, in San Francisco, a conditional use permit "may take" over 12 months to process.[20] If T-Mobile is experiencing delays in San Francisco, they are entirely of its own making. T-Mobile was, until recently, many months late in submitting required compliance reports (called Project Implementation Reports) that are a condition for previously approved permits. In addition, T-Mobile has failed to file the required inventory of existing and proposed wireless facilities that must be submitted before any new applications will be considered.[21] Otherwise, conditional use permit

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[16] Source: City of Berkeley. CALWA also makes allegations regarding the City of Carlsbad. California Cities understand that those allegations will be addressed in the reply comments of the Coalition for Local Zoning Authority.

[17] The Coalition for Local Zoning Authority will respond in its reply comments to the allegations regarding the County of Los Angeles and the City of Los Angeles. The short time period for preparing reply comments did not allow California Cities to speak to the County of Monterey regarding T-Mobile's claims.

[18] T-Mobile Opening Comments, Eldridge Declaration, p. 3.

[19] Source: City of Gardena.

[20] T-Mobile Opening Comments, Eldridge Declaration, p. 3.

[21] It appears that T-Mobile's failure to comply with local requirements is not limited to San Francisco. A recent article in the San Francisco Chronicle reports that: (1) the California Public Utilities Commission is investigating T-Mobile for installing wireless facilities in several Bay Area cities without obtaining required local permits; (2) one Marin County city advised T-Mobile in a September 11, 2008 letter that T-Mobile had installed antennas without the proper permits; and (3) another Marin County city advised T-Mobile in January 2008 that it had failed to comply with permit conditions and to obtain a required inspection and gave T-Mobile 30 days to

(continued on next page)

applications in San Francisco are generally processed in three to six months from initial filing, depending on how long it takes for the applicant to complete the application and the extent to which the applicant has attempted to address community and Planning Department aesthetic concerns in its application. Appeals and any need for extended environmental (CEQA) analysis will also add to the processing time. It should be noted that, in many industrial and (non-residential) commercial areas of the city, it is not necessary to obtain a conditional use permit at all.[22]

County of Santa Cruz: Santa Cruz County questions T-Mobile's claim that it "will take" between 12 to 18 months from application to final hearing for a conditional use permit.[23] T-Mobile is incorrect about the type of permit that is required – for wireless facilities, applicants generally need to obtain a wireless facilities permit. Contrary to T-Mobile's claim, the typical processing time would be six to nine months; these times would be faster, but a general problem is that applicants often take several months to furnish the visual simulations and other information necessary to complete their applications. Only for unusual or controversial applications would applications require as much time as T-Mobile claims. In such instances, factors causing delay would include the need for environmental (CEQA) analysis for scenic viewshed corridors (such as along Highway 1), and appeals to the Planning Commission and the Board of Supervisors. In addition, under the California Coastal Act, for facilities in the coastal zone, opponents of an application have the right to appeal an approved permit to the California Coastal Commission.[24]

County of San Mateo: San Mateo County also disputes T-Mobile's claim that it will take between 12 to 18 months from application to final hearing for a conditional use permit.[25] San Mateo County's regulations require a discretionary permit for cellular facilities. Discretionary permits trigger state law obligations under CEQA, which has its own timeline for environmental analysis and input from other agencies, including (on occasion) federal regulatory agencies. In San Mateo County, exemption from this process is frequently impossible, because the overwhelming majority of the unincorporated area of the county falls in highly scenic rural and coastal areas. The majority of the county's roads are formally designated as "scenic" (including state scenic designations for Highways 280 and 35, and Route 1 along the entire length of the coastline). This

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(footnote continued from previous page)

correct the problems; nine months later, T-Mobile had still failed to comply. *See* "T-Mobile Accused of Installation Violations," San Francisco Chronicle, October 5, 2008, page C-1 (attached as Exhibit A).

[22] Source: City and County of San Francisco.

[23] T-Mobile Opening Comments, Eldridge Declaration, p. 4.

[24] Source: County of Santa Cruz.

[25] T-Mobile Opening Comments, Eldridge Declaration, p. 4.

> precludes many wireless applications in the unincorporated area from qualifying for any CEQA exemption. CEQA requires at a minimum an "initial study" for discretionary permit applications in these scenic corridors, and sometimes a full environmental impact report. San Mateo County also has a number of overlay zoning districts, including Design Review and the Coastal Zone, that require additional compliance with local or state regulations for all permits, not just those for wireless facilities. Any permit applications that take a full 12 to 18 months to reach the final hearing are likely applications that present multiple complicating factors, such as presence in a Design Review zoning district, presence in a scenic corridor, inability to qualify for a lesser level of environmental review, appeals to the Planning Commission and the Board of Supervisors, and potentially appeals to the California Coastal Commission. In San Mateo County's experience, the primary delay in the completion of wireless facilities is not the time-to-hearing for the planning permit process, but rather major delays when carriers are slow to comply with the conditions of approval of their discretionary permits prior to issuance of their ministerial building permits. The Building Department frequently awaits a carrier's full compliance with the permit conditions of an already issued discretionary planning permit, which has taken as long as 90 days.[26]

The foregoing explanations show that the industry's claims of undue delay by local governments do not hold up under scrutiny. A recurrent theme is that the applicants' own delays are a significant contributing factor. In addition, other unavoidable procedural requirements, such as CEQA, extend the timeline. The specific examples fail to offer any support for the claim that local governments are insensitive to their responsibility to act on wireless siting applications in a timely fashion.

III. THE WIRELESS CARRIERS IGNORE CONGRESS' CLEAR INTENT NOT TO IMPOSE ARBITRARY TIME LIMITS ON LOCAL LAND USE DECISIONS THAT WOULD GIVE PREFERENCE TO THE WIRELESS INDUSTRY

For obvious reasons, the wireless industry members submitting opening comments choose not to acknowledge the clear contradiction between CTIA's request for inflexible time limits and the plain words of § 332(c)(7)(B)(ii). As explained in California Cities' opening comments,[27] that provision directs local governments to decide wireless siting requests "within a

[26] Source: County of San Mateo.

[27] California Cities' Opening Comments, pp. 4-7.

reasonable period of time after the request is *duly* filed, *taking into account the nature and scope of such request.*"[28] Congress' use of the word "duly" shows that, contrary to the CTIA proposed time limits, Congress did not expect or require local governments to begin acting on a request until all required information has been submitted. By specifying that the reasonable period of time is measured in relation to the "nature and scope of the request," Congress recognized that variables, such as the ones discussed above and in California Cities' opening comments,[29] must be taken into account when courts decide whether local governments have "failed to act" under § 332(c)(7)(B)(v). Congress could not have been clearer in rejecting rigid and arbitrary time limits of the type proposed by CTIA.

Moreover, the wireless industry commenters also ignore the Conference Report's discussion of § 332(c)(7)(B)(ii), which unequivocally rules out the CTIA proposal.[30] There, Congress clarifies its intent that, in deciding wireless siting applications, local governments are to follow their "generally applicable time frames" for land use decisions and not give "preferential treatment to the personal wireless service industry in the processing of requests."[31] CTIA's proposal for fixed time limits for the sole benefit of the wireless industry directly contravenes the manifest intent of Congress. The wireless industry's failure even to mention this directly applicable legislative history is even more glaring in light of the fact that the Commission itself directly cited this language in 1997 when it proposed a sensible case-by-case

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[28] § 332(c)(7)(B)(ii)(emphasis added).

[29] California Cities' Opening Comments, pp. 10-16.

[30] *See id.*, pp. 6-7.

[31] Conference Report, pp. 207-208.

approach to determining whether state or local governments had "failed to act" under § 332(c)(7)(B)(v).[32]

As did CTIA, several wireless industry commenters complain of an "untenable situation" in not knowing whether a court will agree with them that a local jurisdiction has taken an unreasonable time to act.[33] The wireless carriers fail to show that they are subject to any unusual or unfair hardship. Rather, they face the uncertainty that is typical in litigation – they may win their case or they may lose it. If a wireless carrier believes that a local jurisdiction has failed to act within a reasonable time as defined in § 332(c)(7)(B)(ii), Congress vested in the courts exclusive jurisdiction to hear such complaints and to give them expedited consideration.[34] Much as the wireless carriers may desire rigid time limits that ignore generally applicable local zoning procedures, Congress recognized the many variables in different siting requests and wisely rejected fixed time limits in favor of flexible case-by-case determinations.

IV. CALIFORNIA'S PERMIT STREAMLINING ACT IMPOSES SIGNIFICANT CONSTRAINTS ON LOCAL TIMELINES FOR LAND USE DECISIONS WHILE RECOGNIZING APPLICANTS' RESPONSIBILITY TO COMPLETE THEIR APPLICATIONS

CALWA presents a confusing discussion of California's Permit Streamlining Act ("PSA")[35], which CALWA claims is "ineffective" for wireless applicants and which the Commission should "correct" (in other words, preempt) by adopting CTIA's proposal.[36] In fact, the PSA places significant timing constraints on local decisions regarding wireless permits and

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[32] *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, ¶ 138 (1997) ("*RF Procedures Notice*"). *See* California Cities' Opening Comments, pp. 8-10.

[33] MetroPCS Opening Comments, pp. 4-5; Sprint Opening Comments, p. 4; Comments of NextG Networks, Inc., pp. 8-9.

[34] § 332(c)(7)(B)(v). For a complete discussion of the courts' exclusive jurisdiction over complaints that local governments have violated § 332(c)(7), see California Cities' Opening Comments, pp. 18-20.

[35] Calif. Gov. Code § 65920 *et seq.*

[36] CALWA Opening Comments, pp. 5-6.

does so in a more nuanced and reasonable way than CTIA's inflexible time limits. Preempting the PSA would be both unwise as a matter of policy, and, as explained above and in California Cities' opening comments,[37] contrary to Congress' direction that wireless siting decisions be made in accordance with applicable state and local requirements.

The PSA has two goals – to clarify the permit process for applicants and to relieve permit applicants from "protracted and unjustified governmental delays."[38] The PSA requires local governments to follow a standardized process with respect to land use decisions and requires decisions on permit applications within prescribed time limits.[39] Key to the PSA are its provisions to prevent local government delay in determining the completeness of an application. Within 30 calendar days of receiving a permit application, a local government must inform the applicant in writing whether the application is complete and accepted for filing. If the application is not complete, the local government must point out where the application is deficient and specify the additional information needed.[40] If the local government fails to notify the applicant whether the application is complete, it will be deemed complete 30 days after receipt by the local government.[41]

Importantly, the PSA's time limits do not apply until after an application is determined to be complete or deemed complete by operation of law.[42] Thus, unlike CTIA's proposal, California law recognizes that local governments cannot be expected to process an application until they have all the required information.

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[37] California Cities' Opening Comments, pp. 4-7.

[38] *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1046 (Cal. 1997).

[39] *See generally*, D. Curtin and C. Talbert, *Curtin's California Land Use and Planning Law* (Solano Press Books 2007) 27th Edition, pp. 457 - 461.

[40] Cal. Gov. Code § 65943.

[41] *Id.*

[42] *See Curtin's California Land Use and Planning Law*, p. 458.

Under the PSA, local governments must act on a permit application within 60 days of a finding that the project is either exempt from CEQA or the local government has adopted a "negative declaration"[43] under CEQA. Failure to act on the permit application within this time period will result in the application being deemed approved, with an important proviso -- if applicable law requires public notice or a hearing before the application can be decided, the application will not be deemed approved until the public notice requirements have been satisfied.[44] To prevent a local government from delaying a decision simply by failing to effectuate the required public notice, the PSA allows applicants to force the issue by: (a) either seeking a court order directing the local government to fulfill the required public notice[45] or (b) providing the notice itself.[46] In this way, the PSA ensures that its time limits do not short-circuit the public's right to obtain the notice of permit applications and to make their views known to local governments. In contrast, CTIA's proposal would effectively preempt such notice requirements by deeming applications approved even in cases where, despite a city's best efforts, the notice could not be completed within the required time.

CALWA's claim that the PSA is ineffective is based on unclear objections. First, CALWA asserts, without further explanation or support, that the 60-day time limit and the "deemed approved" provisions "leave local jurisdictions with too much discretion."[47] As shown, those provisions are not discretionary at all. California Cities can only guess that CALWA objects to the sensible proviso that prevents the public's right to adequate notice from being abridged. Second, CALWA states that local governments can avoid triggering the 60-day clock

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[43] A negative declaration is a finding, after an initial study, that the project will not have a significant environmental impact.

[44] Cal. Gov. Code § 65956.

[45] Cal. Gov. Code § 65956(a).

[46] Cal. Gov. Code § 65956(b).

[47] CALWA Opening Comments, p. 5.

by failing to make a decision on "the zoning application."[48] CALWA offers no citation or explanation for this puzzling assertion, and thus California Cities can offer no other response than to point out the lack of support for this claim in the PSA.

CALWA misleadingly argues that the CTIA timeframes are reasonable by comparison to the PSA's 30-day time limit for determining whether an application is complete and the 60-day time limit for acting on applications.[49] CALWA is comparing apples and oranges. The 30-day period for assessing completeness of an application is clearly not comparable to a time limit for *deciding* an application. And, as noted, the PSA's 60-day limit sensibly applies only after an application has been completed or deemed complete by operation of law and after the required CEQA determination has been made. CTIA would charge the time that the applicant has failed to complete its application against the local government, effectively requiring local governments to act without all of the information they require – and depriving the public of a decision based on all the facts.

In sum, contrary to CALWA's unsupported assertions, the PSA does impose meaningful limits on the time that California local governments may take to review and decide applications. At the same time, it recognizes that applicants also can cause delay by failing to provide required information. In addition, the PSA preserves the public's right to notice of land use projects. In contrast, CTIA's proposal includes neither of these common sense and essential protections. The PSA shows that state and local governments such as California are capable of addressing in a reasonable way industry concerns that permit processing takes too long. There is no need for the Commission to preempt such state and local requirements. In any event, as explained above and

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[48] *Id.*

[49] *Id.*, p. 6.

in California Cities' opening comments,[50] § 332(c)(7) does not allow the preemptive rule that CTIA proposes.

V. CONCLUSION

For the reasons set forth in these reply comments and in the opening comments of California Cities', the Commission should dismiss the CTIA Petition without hesitation.

DATED: October 14, 2008

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[50] *See* California Cities' Opening Comments, pp. 4-7.

EXHIBIT A

"T-Mobile Accused of Installation Violations", *San Francisco Chronicle*, October 5, 2008, page C-1

SFGate.com

T-Mobile accused of installation violations

Seth Rosenfeld, Chronicle Staff Writer

Sunday, October 5, 2008

Neighbors wondered why workers waited until late on a summer night to erect an antenna atop a building near the Bon Air shopping center in Greenbrae.

As it turned out, the crew - allegedly working without the required permits - was installing the antenna for T-Mobile, the cell phone giant that has been rushing to set up hundreds of cellular transmission sites around Northern California.

That Marin County installation is one of several in the Bay Area where T-Mobile has been accused of ignoring local zoning rules to set up cell sites, according to building officials and public records.

Other sites allegedly in violation are in San Francisco, Alameda and San Leandro.

In addition, five former employees who helped T-Mobile install antennas told The Chronicle the firm has routinely put up and modified transmission sites without getting permits.

The Chronicle reported last month that the California Public Utilities Commission is investigating whether T-Mobile is violating a commission rule that requires cell phone companies to comply with local zoning and building laws.

The PUC has fined other cell phone firms up to $4.37 million for violating local building codes. A PUC investigator declined to comment on the case.

T-Mobile spokesman Rod De La Rosa said the company is committed to complying with the rules. "Building and maintaining cell sites to bring the best service to customers is often a complex process," he wrote in an e-mail. "As we learn of issues, we address them."

The commission inquiry comes as T-Mobile introduces its G1 smart phone, based on Google's Android operating system.

'Pressure' from T-Mobile

According to the former employees, T-Mobile offers its managers bonuses if they meet quarterly goals for putting up new sites. The managers have pressured subcontractors to take shortcuts when installing antennas, they said.

Among the subcontractors was Lee Middleton, who said he worked for Irvine's Delta Groups

Engineering Inc. Earlier this year, Middleton was assigned to review records for about 1,033 T-Mobile sites around the Bay Area. "Way more than half" were missing documentation showing that the work had been done properly, he said in an interview.

Middleton brought these discrepancies to the attention of T-Mobile managers, he said, but "no one wanted to take responsibility." He said he felt pressured to sign off on the projects despite the missing records. "I was uncomfortable about that," he said.

Subsequently, Middleton was told not to report back to work at T-Mobile, he said.

Middleton said he told Delta Group managers that he had raised issues with T-Mobile, but they did not support him and he resigned.

De La Rosa said T-Mobile would investigate the allegations. A Delta vice president declined to comment.

In the Greenbrae case, a T-Mobile subcontractor applied for a building permit in July to replace antennas at 1000 Drakes Landing Road.

An official at the Larkspur Planning Department, which covers Greenbrae, wrote in a July 10 letter that a use permit was required and that the installation would encroach on city property.

Later, neighbors noticed the late-night work crew and complained. On Sept. 11 the department notified T-Mobile's representative that the installation had been done "without the proper permits."

De La Rosa said the firm had a permit for this site and does not believe it is encroaching on city property.

Also in Larkspur, T-Mobile antennas on the Tamalpais retirement center were installed improperly, records show. "The new panel antennas and wiring are exposed and unsightly, and lack the approved decorative fiberglass enclosures," senior planner Kristin Teiche wrote on Jan. 22.

T-Mobile also failed to get a required inspection from the building department, she noted.

T-Mobile was told to fix the problem within 30 days, but nine months later the firm has not done so.

"They are the only carrier that we have had trouble in getting them to comply with our permitting requirements," Teiche said.

Fixing the problem

When temporary permits expired, T-Mobile continued to operate the antenna for almost

two years, said Sonia Urzua, a senior planner with the Alameda County Planning Department. T-Mobile is fixing the problem, she said.

De La Rosa said T-Mobile now has a temporary permit.

In Alameda, T-Mobile got a permit to install a cell phone antenna atop Alameda High School. But the firm operated the site without the final inspection required by the Division of the State Architect, said division spokesman Eric Lamoureux. As a result, the school district could be liable for accidents resulting from the installation, he said.

In San Francisco, T-Mobile installed a panel antenna inside a sign at the Ananda Fuara restaurant on Market Street, one former subcontractor said. T-Mobile never obtained permits, said Jonas Ionin, a senior city planner.

San Francisco officials stopped T-Mobile's installation of two other antennas in North Beach - one on Columbus Avenue and another on Filbert Street - after discovering the temporary permits lacked appropriate review, he said.

T-Mobile failed to submit a complete five-year plan for cell sites in San Francisco, Ionin said, and as a result the city has frozen all of the firm's pending applications. De La Rosa disputed the assertion that T-Mobile was late in filing its plan.

Several Bay Area planning officials said their departments are short staffed and rely on the goodwill of telecommunications firms to follow the rules. Improper installations often come to light only because of complaints, they said.

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http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/05/BUQD134FCV.DTL

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